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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 613

IN THE MATTER OF

GRANADA APARTMENTS, INC., A CORPORATION,
Debtor.

GRANADA APARTMENTS HOTEL CORPORATION,
A CORPORATION,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY
OF CHICAGO, INDIVIDUALLY AND AS
SUCCESSOR TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Granada Apartments Hotel Corporation prays the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the 7th Circuit entered June 6, 1946, as modified July 17, 1946. Said judgment (a) overruled petitioner's motion to dismiss the appeal

in that court because not prosecuted within the time and in the manner provided by section 250 of the Bankruptcy Act, governing appeals from orders allowing or disallowing fees and expenses in corporate reorganization proceedings; (b) reversed the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, denying allowance to respondent of fees for its attorneys and expenses in prior litigation in this case; and (c) directed the entry of a judgment by the district court, without further hearing, for approximately $20,500 on account of said fees and expenses.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the 7th Circuit is reported at 155 F. 2d 882. Prior litigation in this case is reported in 111 F. 2d 834; reversed, 312 U.S. 262.

STATEMENT OF THE MATTER INVOLVED.

This case arises in corporate reorganization proceedings commenced under Section 77-B of the Bankruptcy Act and concluded under chapter 10 of the Bankruptcy Act.

City National Bank and Trust Company of Chicago, the respondent, was successor trustee under a trust deed securing the first mortgage bonds of the debtor.

A plan of reorganization of the debtor was confirmed by the district court July 14, 1937 and the property of the debtor was turned over to Granada Apartments Hotel Corporation, petitioner, by order of October 22, 1937, subject to the then pending claims for fees and expenses. **(R. 98)**

In September 1937 there were pending before the district court in this case:

(1) Petitions for fees and expenses of City National, the bondholders committee, and their counsel, in the aggregate amount of approximately $41,000. (R. 232)

(2) The report and account of City National, as trustee formerly in possession of the property of the debtor. (R. 232)

(3) Objections of the trustee in bankruptcy to the foregoing petitions for fees and expenses and to the report and account. He set up various breaches of trust and mismanagement by City National and pointed out that these claimants had acted in dual and conflicting capacities. (R. 28)

(4) A counterclaim by the trustee in bankruptcy against City National based upon the same allegations and contained in the same document as were the objections to the fees and expenses claimed. (R. 28)

The fee and expense claims were referred to Referee Chindblom to hear and report the evidence thereon without conclusions of law or fact. Additional evidence was heard directly by the district court. The records of the two hearings were consolidated by order of October 21, 1937.*

All pending matters were disposed of by one order of district court on May 2, 1939. The trustee's charges against City National were sustained, but recovery on the trustee's counterclaim was denied except as recoupment against the fee and expense claims. (R. 129)

City National then appealed from the order denying

* Record in Nos. 281 and 282, p. 712.

to it, its counsel, and the bondholders committee fees and expenses (Nos. 7060 and 6986 in the circuit court of appeals). Thereafter, the bankruptcy trustee appealed from the same order on the ground that a money judgment should have been entered against City National (No. 7061 in the circuit court of appeals). There was one record. The cases were consolidated for argument and disposed of in one opinion, *City National Bank and Trust Company, et al* v. *Woods,* 111 F. 2d 834. The circuit court of appeals reversed the judgment of the district court.

Two petitions for certiorari were filed by the bankruptcy trustee. No. 310 sought reversal of the order denying the bankruptcy trustee a money judgment against City National. Certiorari was denied October 14, 1940, *Woods* v. *City National, et al,* 311 U.S. 676. Nos. 281-282 sought reversal of the action of the circuit court of appeals sustaining the fee and expense claims. Certiorari was granted October 14, 1940, *Woods* v. *City National Bank and Trust Company, et al.,* 311 U.S. 629. February 3, 1941, the judgment reviewed in Nos. 281-282 was reversed, *Woods* v. *City National Bank and Trust Company of Chicago,* 312 U.S. 262.

This court there denied to City National Bank, the bondholders committee dominated by City National, and the counsel for both of the foregoing, all fees and expenses other than expenses *which directly benefited the estate.*

The requested fees and expenses were denied because applicants had acted in dual and conflicting capacities. Thereafter, City National filed in the district court a petition for reimbursement for alleged expenses of successfully defending itself against unjustified charges of breach of trust brought against it by the trustee in bankruptcy. (R. 143)

After hearing evidence, the special master to whom City National's petition was referred by the district court, found:

(1) City National was not engaged exclusively in the defense of a claim against it (the alleged expense of which it now claims), but on the contrary was engaged in the prosecution of its several claims for fees and expenses, to which the trustee in bankruptcy had filed objections, and that the expenses now sought to be recovered were incurred in the unsuccessful prosecution of its claims. (R. 238)

(2) City National, having been denied compensation and reimbursement for expenses except those which directly benefited the estate, is now barred from reimbursement for the expense of its incidental defense against the claims of the trustee in bankruptcy. (R. 238)

(3) Should the foregoing conclusions be reversed, the master said, the items claimed by the bank, with one exception, "were incurred by the bank in the objections and counterclaim of the trustee and are proper items of allowance * * *", and that the requested attorney fee is reasonable. The master concluded, however, that since the security holders received a return through the reorganization of only 35 per cent of their investment, the City National should be limited to 35 per cent of the requested allowance. (R. 239)

The master recommended that the petition be denied. The district court confirmed the master's report of October 4, 1944. On November 6, 1944, the district court entered an order vacating its October 4, 1944 order and again

confirming the master's report and dismissing the petition *nunc pro tunc* as of October 4, 1944. (R. 245)

Notice of appeal was filed November 13, 1944 and the record was filed in the circuit court of appeals February 1, 1945, nearly four months after entry of the order appealed from. No application for leave to appeal was made to the circuit court of appeals.

Petitioner moved to dismiss the appeal because the order appealed from denied respondent reimbursement for expenses and was hence governed by section 250 of the Bankruptcy Act (11 U.S.C. 650). Petitioner contended that in the absence of presentation to the circuit court of appeals within forty days of the order appealed from, the circuit court of appeals had no jurisdiction of the matter. The motion to dismiss was denied by the circuit court of appeals, which thereupon reversed the trial court and ordered entry of judgment in the trial court for the amount prayed in the petition.

JURISDICTIONAL STATEMENT.

(a) The statutory provision believed to sustain the jurisdiction is found in section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. 347).

(b) The judgment sought to be reviewed was entered June 6, 1946, and petitioner's petition for rehearing denied July 17, 1946. The date upon which this application for certiorari as presented is October 14, 1946.

QUESTIONS PRESENTED.

1. Is not the petition in this case one for reimbursement of expenses under section 250 of the Bankruptcy Act, and therefore should not the appeal herein have been

dismissed because neither (a) a petition for leave to appeal was filed in the Circuit Court of Appeals for the Seventh Circuit, nor (b) was the matter otherwise brought before the Circuit Court of Appeals for the Seventh Circuit within forty days from the entry of the order denying the petition?

2. Is not the present claim for reimbursement for expenses barred by the prior holding of this court, denying recovery to respondent except for expenses shown to have benefited the estate?

3. Should a mortgage trustee be reimbursed for alleged expenses incurred by it in defending itself against charges of fraud and mismanagement asserted by a *bankruptcy trustee*, where the expenses of defense were incurred in the same litigation in which it was asserting claims for compensation which were denied because of its breach of trust and there was no showing that the bankruptcy trustee's assertion of a counterclaim caused the mortgage trustee any greater expense than was involved in the mortgage trustee prosecuting its own claims.

4. Should the master's finding of fact, approved by the trial court, that City National's expenses for which reimbursement was sought were incurred not in defense but in prosecuting City National's own claim for fees and expenses, be reversed on appeal, where the record sustains such finding?

5. Should the mandate of the circuit court of appeals have directed the trial court to enter judgment for the full amount sought where there had been no hearing except before the master, who limited recovery to 35 per cent of the amount sought, hence eliminating the necessity of determining whether the proof sustained recovery on individual items and where the trial court adopted the principal finding of the master that no recovery was justified and had no occasion to pass upon his alternative finding.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Question No. 1 has been decided by the circuit court of appeals in direct conflict with the decision of this court in *Dickinson Industrial Site* v. *Cowan*, 309 U.S. 382, and involves a misconception of the rule laid down by this court in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group*, 311 U.S. 579.

2. Question No. 2 has been decided by the circuit court of appeals in direct conflict with the decision of this court in *Woods* v. *City National Bank and Trust Company of Chicago*, 312 U.S. 262.

3. Question No. 3 is an important question of federal law decided by the circuit court of appeals, which has not been but should be settled by this court.

4. In ignoring the primary finding of fact by the master which was approved by the trial court (question No. 4), in ignoring the prior adjudication of this court in this matter (question No. 2), and in directing the entry of a judgment without affording petitioner an adequate hearing (question No. 5), the circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The appeal should have been dismissed by the circuit court of appeals. The order of the trial court dismissed respondent's petition for reimbursement of expenses, hence the appeal could only be prosecuted by leave of the circuit court of appeals presented within forty days from the entry of the order appealed from.

The circuit court of appeals in allowing the appeal, although nothing was before that court until almost four months after the entry of the order appealed from, misconstrued the holding of this court in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group*, 311 U.S. 579.

II.

This court in *Woods* v. *City National Bank and Trust Company of Chicago*, 312 U.S. 262, held that City National, the respondent, was only entitled to recover in these proceedings expenses which directly benefited the estate. No claim is made that the expenses here sought to be recovered benefited the estate, hence no recovery is justified and the decision below permitting such recovery is in direct conflict with the prior decision of this court.

III.

The special master who heard this matter found that City National was entitled to no recovery, since the expenses for which it sought reimbursement were incurred

in the prosecution of its own claims and not in defense of claims against it. This finding was adopted by the trial court and the petition was dismissed.

The circuit court of appeals in violation of rule 52 of the Rules of Civil Procedure for District Courts of the United States ignored this finding which was fully justified by the evidence, and based its decision upon an alternative finding of the special master which was not approved by the trial court and was applicable only if the primary finding denying recovery had not been adopted by the trial court.

IV.

There is no precedent for recovery in this case. The rule permitting reimbursement for litigation expenses is only applicable to a case where a beneficiary of a trust has unsuccessfully attacked the trustee. Here the attack was not by a beneficiary of a trust but by a bankruptcy trustee pursuing his statutory duty to object to the allowance of claims against the estate deemed by him to be improper.

V.

The mandate of the circuit court of appeals directed entry of judgment in the trial court in favor of City National for the full amount claimed, approximately $20,500. This deprived petitioner of a hearing on the sufficiency of the proof to justify the allowance of particular items of claimed expense. The only prior hearing on this phase of the case was before the special master. The district court never had occasion to pass upon this question of the sufficiency of the proof on the various items, since the controversy was disposed of by that court on the master's primary finding that there should be no recovery.

ARGUMENT.

I.

Petitioner's motion to dismiss the appeal in the circuit court of appeals should have been granted.

City National's petition, filed May 12, 1941 in the district court, alleged that "the indenture trustee is entitled in equity and by the law of Illinois to recover out of the trust estate now under the jurisdiction of this court all expenses and charges reasonably and necessarily incurred in and about the successful defense of said (the bankruptcy trustee's) counterclaim, including reimbursement for the reasonable fees of its counsel amounting to $15,000." (R. 141)

The other items of expenses, all or part of which were sought to be recovered, were as follows:

(a) Fees of auditors and expert witnesses, $1,260;

(b) Court reporter's fees, $1,777.35, and money paid the clerk of the Circuit Court of Appeals for printing the record in the previous appeal, $1,475;

(c) Expense of printing various briefs in the Circuit Court of Appeals and in the Supreme Court of the United States, and other miscellaneous expenses of appeal, $2,191.63.

Section 242 of the Bankruptcy Act (11 U.S.C. 642)*

* Sec. 242 is as follows:

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses in-

permits allowances for expenses incurred in the administration of an estate. The basis for an allowance of reimbursement to a trustee for its successful defense is that it has incurred the expense in administering the estate. (See *Patterson* v. *Northern Trust Company*, 286 Ill. 564, 569, and *Waterman* v. *Alden*, 144 Ill. 90, cited by the circuit court of appeals.) The claimant here sought *reimbursement*. Section 250 of the Banruptcy Act (11 U.S.C. 650)** covers appeals from orders making or refusing to make allowance of compensation or *reimbursement*. Appeals from such orders may be prosecuted only by leave of the circuit court of appeals. Since the decision of this court in *Dickinson Industrial Site* v. *Cowan*, 309 U.S. 382, there has been no doubt on this subject. Such appeal must be taken not later than forty days from

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curred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

** Sec. 250 is as follows:

Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

the entry of the order appealed from. (Bankruptcy Act, Section 25(a), 11 U.S.C. 48(a)***.)

The order here appealed from was entered October 4, 1944. (R. 245) The case was not before the Circuit court of appeals in any manner until the record was filed February 1, 1945, more than three months after the entry of the order sought to be reviewed and more than two months after the time for the presentation of the matter to the circuit court of appeals had expired.

The circuit court of appeals held that the petition of City National presented neither a claim nor a petition for reimbursement (R. 281), but that if the appeal should have been by leave, it was then allowing the appeal, and cited *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* 311 U.S. 579, as justifying this action. The circuit court of appeals apparently misunderstood this decision. This court there held that the filing of a petition for leave to appeal was not jurisdictional. It did not hold that failure to bring the matter before the circuit court of appeals within the statutory time was not jurisdictional, as apparently the circuit court of appeals in this case believed. The record in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group* discloses that the case there *was* before the circuit court of appeals within the statutory time, although not formally presented by petition for leave to appeal. The opinion of

*** Sec. 25(a) is as follows:

Appeals under this title to the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be nor served and filed, then within forty days from such entry.

the Circuit Court of Appeals for the Second Circuit likewise discloses this fact (*In re Prudence Bonds Corporation*, 111 F. 2d 37, at 40-41).

The similarity between this case and *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group* ends with the fact that in both cases there was no petition for leave to appeal. Failure in this case to bring the case before the circuit court of appeals in any way until more than 2 months after the statutory time to do so had expired makes this case clearly distinguishable.

II.

The previous decision in this case controls.

This court in *Woods* v. *City National Bank and Trust Company of Chicago*, 312 U.S. 262, held that City National, having acted in dual and conflicting capacities, was entitled to no fees and expenses other than those expenses which directly benefited the estate. No claim is made in the present controversy that the expenses sought to be recovered benefited the estate.

In the previous case, the following claims were before this court:

(1) City National sought fees and expenses arising from the state court foreclosure which preceded the bankruptcy court reorganization proceedings. (R. 41-43) The foreclosure was superseded by the bankruptcy and hence was of no benefit to the estate.

(2) The attorneys for City National, who also represented the bondholders committee, and whose fees for the defense of City National are now sought in this case, requested fees for: (a) services rendered City National

from 1933 onward in the foreclosure suit and other litigation outside the bankruptcy reorganization proceedings (R. 66-78); (b) services to the bondholders committee from 1933 through the bankruptcy case (R. 80-88); and (c) services to City National in the bankruptcy proceedings (R. 78-80) including defense against the counterclaim of the bankruptcy trustee. (R. 97, 98) This latter item is the same claim now presented, but all of the services had not been performed at the time the application for fees was originally presented.

(3) The bondholders committee sought recovery of its out-of-pocket expenses incurred in conducting its affairs from 1933 through the bankruptcy reorganization, fees for City National for its services as depositary for the committee, and also compensation to City National for furnishing operating personnel and office facilities for the committee. (R. 51-60)

It is thus apparent that the prior case in this court involved claims for fees and expenses relating to the administration of the estate outside the bankruptcy court, as well as claims for fees and expenses relating to the formulation, approval and carrying out of the plan of reorganization.

This court denied all claims for fees.

With reference to the expense items, this court stated:

> "Some discrimination, however, is necessary in applying the foregoing rule to claims for expenses. Reimbursement for proper costs and expenses incurred in connection with the administration of the estate may be allowed. The rule disallowing compensation because of conflicting interests may be equally effective to bar recovery of the expenditures made by a claimant subject to conflicting interests. Plainly expenditures are not proper within the meaning of the Act where the claimant cannot show that they were made in furtherance of a project exclusively

devoted to the interests of those whom the claimant purported to represent. On the other hand, these expenditures normally should be allowed which have clearly benefited the estate. Scott on Trusts (1939), Sec. 245.1. Thus where taxes have been paid, needful repairs or additions to the property have been made, or the like, equity does not permit the estate to retain those benefits without paying for them. Such classification of expenses, at times difficult, rests in the sound discretion of the bankruptcy court. The district court drew no such distinction but proceeded on the theory that reimbursement for all expenses must be denied. But it is not apparent that all of them fall within the prohibited category." (312 U.S. 262 at 269-270.)

The instant claim of City National is for the expenses which it incurred in the prior litigation and denominated by it as the expenses of its successful defense. Thus it claims 75% of the court reporter's fees and expense of printing the record and the briefs, 75% of the fees of its attorneys in prosecuting the former litigation, and all the expenses of expert witnesses produced by it in the trial court. (R. 141)

It is impossible to distinguish between the expenses now sought to be recovered and those administrative expenses not related to the plan on which this court previously denied recovery.

It is not decisive in this case that blameless trustees, when successfully defending against the attack of a beneficiary, have been held entitled to reimbursement from the trust estate not on the theory of benefit to the estate but because the expense was necessarily incurred in administering the estate.

Here the claimant is not blameless. By the prior adjudication of this court it has been held guilty of a substantial breach of trust by acting in dual and conflicting capacities. Hence this court limited claimant's recovery

to expenses beneficial to the estate. Since the expenses now sought were concededly not beneficial to the estate, no recovery is justified.

III.

The fact findings of the trial court were ignored by the circuit court of appeals.

The primary finding of the special master adopted by the trial court was that the expenses here sought to be recovered were incurred by City National in prosecuting its own claims and *not* in defense of the claims against City National. (R. 238) Thus the trial court dismissed the petition. (R. 245)

This finding of the trial court was ignored by the circuit court of appeals. Instead, the circuit court of appeals stated:

> "The special master found, and the district court approved the finding, that the attorney fee of $15,000 for defending against the counterclaim was reasonable, and that claimant's items of out-of-pocket expense, except an item of title expense for $1,135.30, which has been paid, were proper items of allowance. Under broad equitable principles those findings are certainly sound." (R. 282)

The finding above referred to was an alternative finding not approved by the district court and applicable only if the primary finding denying recovery should not be adopted by the trial judge to whom the special master was reporting.

In ignoring the primary finding of the master adopted by the trial court, and in relying upon the alternative finding of the master upon which the trial court did not pass and did not adopt, the action of the circuit court of appeals

is in direct conflict with rule 52 of the Rules of Civil Procedure for District Courts of the United States, which in accordance with long recognized previous law provides that findings of fact shall not be set aside unless clearly erroneous and that the findings of a master to the extent that the court adopts them shall be considered as the findings of the court.

Realistic appraisal of the record amply justifies the finding actually approved and acted upon by the trial court.

To recover fees and expenses in the original litigation, City National, its bondholders committee and its counsel, had to clear themselves of the charges of breach of trust, mismanagement and of acting in dual and conflicting capacities. The formal proof of the services rendered by the parties, taken before Referee Chindblom, was consolidated with the evidence heard by the district judge on the charges of breach of trust. One order of the district court, entered May 2, 1939, disposed of all of the issues. While City National might have insisted on a separate trial of those charges against it which, if sustained, might have resulted in a money judgment, it did not do so. There was but one trial covering all issues. Therefore, it had no separate expense of defending itself, as distinguished from the expense incurred in prosecuting its own claims.

In this court and in the circuit court of appeals there was one record. In the circuit court of appeals there was one argument, and one opinion of that court disposed of the whole matter (*City National Bank and Trust Company, et al* v. *Woods,* 111 F. 2d 834). This court denied certiorari on the bankruptcy trustee's claim for a money judgment against City National, so that that phase of the case never had to be argued in this court. No separation of the expense of preparing and printing those parts of the

record alleged to have had special reference to the claims for a money judgment against City National was made by respondent. (R. 195) There was no separation of the time its attorneys spent in defense of City National as distinguished from the time spent in prosecuting City National's claims for fees and expenses. (R. 201)

An examination of the detailed items of expense claimed further demonstrates the soundness of the trial court's conclusions. Briefly, the items are as follows:

(a) *Attorneys' fees*: 2,400 hours in the aggregate were spent by City National's attorneys in this matter, of which 700 hours were spent in the trial court and the balance on appeal. There is no segregation of the time spent other than that between the trial court and the appellate proceedings. (R. 201) As a conclusion, counsel made an allocation of 75% of the time to defense of the City National. (R. 198, 201) No facts support this conclusion. Analysis of the printed record in the prior proceedings positively negatives the conclusion. Counsel himself characterized this allocation as "arbitrary." (R. 201) There were, he said, "a number of law suits in one bunch." (R. 98)

(b) *The expenses of auditors and expert witnesses*: Recovery is sought for the fees paid to auditors who prepared the factual material contained in City National's report and account filed in these proceedings. This expense is not shown by the evidence to have been incurred because of any claim of the bankruptcy trustee against City National.

The bankruptcy trustee attacked City National for not receiving from the Arlington building, which was adjacent to the building of the debtor and also controlled by City National, adequate compensation for heat, light and refrigeration service furnished by the debtor's building to

the Arlington building. (R. 197) Therefore City National employed engineers who testified that the Arlington building had paid adequately for the services it received. The circuit court of appeals in the previous litigation, while finding that there was no fraud in the transaction, did state that it might have aroused some suspicion. (111 F. 2d 834 at 840) In the previous case, this court commented upon the conflicting interests of City National as follows:

> "In this case the indenture trustee was also indenture trustee for neighboring apartment properties and dominated the committees representing the bonds of those other companies. Two members of respondent committee were also members of one of those other committees. There was no unitary plan of reorganization for these several properties. But there were dealings between them by their common representatives—dealings attacked by petitioner as unfair to the instant company and defended by respondents as fair." (312 U.S. 262 at 267)

The controversy which required the employment of the engineers was provoked by the dual and conflicting capacities in which City National was acting. Any expense incurred on this phase of the case is clearly attributable to its adjudicated breach of trust.

(c) *Court reporter's fees and the expense of printing the record on the former appeals*: These expenses were incurred in making and printing the record used in both City National's unsuccessful appeal from the denial by the trial court of the claimed fees and expenses, in which it was the losing party, as well as in the other case in which it prevailed. The cost of printing the record could have been taxed as costs in City National's favor upon the conclusion of the litigation if it were entitled thereto. However, the mandates of this court properly taxed the costs in favor of the bankruptcy trustee, the prevailing

party, and against City National, the losing party. (R. 131-135)

No theory is advanced under which this adjudication can now be reviewed in the present proceedings.

(d) *Expense of printing briefs and other expense on appeal*: No discrimination between the various cases is shown in these items of printing and incidental expenses. No proof was made as to the $520.49 claimed for printing, travelling expenses, etc. (R. 144) The item of $669.36 was admittedly incurred *after* the denial of certiorari in Supreme Court case No. 310 on October 14, 1940, which set at rest any affirmative claim against City National. (R. 144)

IV.

There is no precedent for the allowance made to City National in this case.

The authorities cited by City National and adopted in the opinion of the circuit court of appeals as justifying reimbursement to City National for its expense of defense (R. 282) involve reimbursement to a fiduciary who has successfully defended itself against unjustified charges made against it by a beneficiary of its trust. No beneficiary here acted. City National was attacked by the trustee in bankruptcy pursuing his statutory duty of objecting to improper claims (Sec. 47(a)(8), Bankruptcy Act, 11 U.S.C. 75(a)(8).)*

No prior case has established the proposition that a trustee in bankruptcy who attacks the acts of a fiduciary, in resisting (by counterclaim as well as by other defenses)

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* Sec. 47(a)(8) is as follows:

Trustees shall * * * (8) examine all proofs of claim and object to the allowance of such claims as may be improper.

the claims of the fiduciary against the estate, thereby subjects the estate to payment of the fiduciary's attorney fees and other litigation expenses not recoverable as costs. Such a question is a serious one. If this be the law the interests of creditors and the administration of bankruptcy estates will be seriously jeopardized.

V.

The mandate should not have directed the entry of a judgment for the full amount claimed.

The mandate of the circuit court of appeals directed the district court to "enter an order directing Granada Apartments Hotel Corporation to pay the City National Bank and Trust Company of Chicago the amounts prayed for in its petition after deducting the title expense in the sum of $1,135.30, which has been paid to the City National". (R. 285)

This deprived petitioner of a hearing on the question of whether the proof justified the allowance of particular items of claimed expense. The trial court, since it adopted the primary finding of the special master that there should be no recovery, had never passed upon the subsidiary finding of the special master as to the possible amount of recovery. Under the master's subsidiary finding the most that City National might have recovered was less than $7,500.

We have previously pointed out the infirmities in the proof as to specific items claimed. With a $7,500 ceiling on recovery, the details were relatively unimportant. With a possible recovery of the full amount claimed, over $20,000, petitioner is clearly entitled to the judgment of the trial court as to whether the proof justifies the recovery of each item claimed.

CONCLUSION.

Petitioner's motion to dismiss the appeal should have been allowed by the circuit court of appeals. In the alternative, on the merits, this case presents nothing more than an attempt to avoid the prior decision of this court in this controversy. Respondent is seeking to shift to the bankruptcy estate the expense of its unsuccessful prosecution of its fee claims. The district court order should have been affirmed.

We respectfully submit that the writ of certiorari here sought should be granted.

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